STATE OF MICHIGAN

IN THE SUPREME COURT

In the Matter of the Complaint of the **CARRIER CREEK DRAIN DRAINAGE DISTRICT** for Condemnation of Private Property for Drainage Purposes in Eaton County, Michigan.

/

CARRIER CREEK DRAIN DRAINAGE DISTRICT,
Plaintiff–Appellee,
v
LAND ONE, L.L.C.,
Defendant–Appellant.

Supreme Court No. 130125
Court of Appeals No. 255609
Eaton County Circuit Court No. 03-67-CC

/

CARRIER CREEK DRAIN DRAINAGE DISTRICT,
Plaintiff–Appellee,
v
ECHO 45, L.L.C.,
Defendant–Appellant.

Supreme Court No. 130126
Court of Appeals No. 255610
Eaton County Circuit Court No. 03-68-CC

/

CARRIER CREEK DRAIN DRAINAGE DISTRICT,
Plaintiff–Appellee,
v
LAND ONE, L.L.C.,
Defendant–Appellant,
and
STANDARD FEDERAL BANK,
Defendant.

Supreme Court No. 130127
Court of Appeals No. 255611
Eaton County Circuit Court No. 03-69-CC

/

APPELLANTS' SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLEE'S BRIEF IN REPLY TO AMICUS CURIAE BRIEF OF MICHIGAN ASSOCIATION OF REALTORS®

FRASER TREBILCOCK DAVIS & DUNLAP, P.C. LAWYERS LANSING, MICHIGAN 48933

APPELLANTS' SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLEE'S BRIEF IN REPLY TO AMICUS CURIAE BRIEF OF MICHIGAN ASSOCIATION OF REALTORS®

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STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This Supplemental Brief is respectfully submitted by Defendants–Appellants Land One, LLC and Echo 45, LLC, in response to the Plaintiff–Appellee's Reply Brief filed in response to the *Amicus Curiae* Brief of the Michigan Association of Realtors®. The Defendants–Appellants shall continue to rely upon their discussion of the pertinent facts presented in their Application.

LEGAL ARGUMENT

I. MCL 213.55(3) DOES NOT REQUIRE NOTICE THAT A LANDOWNER WILL SEEK JUST COMPENSATION FOR A TAKING OF PROPERTY BASED UPON A HIGHER AND BETTER USE IN ACCORDANCE WITH A POTENTIAL REZONING OF THE PROPERTY.

The Plaintiff–Appellee has submitted a Reply Brief in response to the *Amicus Curiae* Brief filed by the Michigan Association of REALTORS® in support of Defendants–Appellants' Application for Leave to Appeal in these cases.[1] A brief response to that reply is necessary to ensure that the Court is properly informed concerning the issues to be addressed at oral argument.

A. PLAINTIFF'S PROPOSED CONSTRUCTION OF MCL 213.55(3) IMPERMISSIBLY ERODES A LANDOWNER'S RIGHT TO HAVE JUST COMPENSATION DETERMINED IN ACCORDANCE WITH THE HIGHEST AND BEST USE OF THE PROPERTY.

As Plaintiff has acknowledged on pages 7 and 8 of its Reply Brief, a determination of just compensation requires "a consideration of all the multiplicity of factors that go into

[1] The Michigan Association of REALTORS® filed their proposed "Michigan Association of REALTORS® Brief *Amicus Curiae* In Support of the Position of Defendants/Appellants"

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making up value." *Silver Creek Drain District v Extrusions Division, Inc.*, 468 Mich 367, 377; 663 NW2d 436 (2003). It has become well settled in Michigan that in condemnation cases, the landowner is entitled to receive compensation based upon the highest and best use of the property involved. The "highest and best use" is the most profitable and advantageous use the owner may make of the property, even if the property is presently used for a different purpose or is vacant, so long as there is a market demand for such use. *St. Clair Shores v Conley*, 350 Mich 458, 462; 86 NW2d 271 (1957); *In Re Condemnation of Lands in Battle Creek*, 341 Mich 412, 421-422; 67 NW2d 49 (1954); M Civ JI 90.09.

As the Real Property Section of the State Bar of Michigan has appropriately noted, the determination of a property's highest and best use may properly be described as "the foundation on which market value rests." (Real Property Section *Amicus Curiae* Brief, p. 18)[2] Accordingly, the determination of the property's highest and best use is the first step in the valuation process. When the highest and best use of the property has been determined, it is then necessary to evaluate the probability that this use can be achieved in light of all relevant circumstances, including existing land use regulations and the strength of any possibility for rezoning, and to value the property at the time of the taking in accordance with that probability.

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with their motion for leave to file the same on July 21, 2006. The Association's motion for leave to file its *Amicus Curiae* Brief was granted by this Court's Order of August 14, 2006.

[2] Standards Rule 1-3 of the Uniform Standards of Professional Appraisal Practice (USPAP) provides that, in developing a market value opinion, an appraiser must: a) "identify and analyze the effect on use and value of existing land use regulations, reasonably probable modifications of such land use regulations, economic supply and demand, the physical adaptability of the real estate, and market area trends" and b) "develop an opinion of the highest and best use of the real estate." The commentary accompanying this provision emphasizes that "An appraiser must analyze the relevant legal, physical, and economic factors to the extent necessary to support the appraisers highest and best use conclusions."

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In reviewing the legal question presented here, the Court should bear in mind that a property's highest and best use may be different from the uses allowed by the present zoning. This comes as no surprise; it is the reason why a possibility of rezoning is relevant to determination of just compensation. Occasionally, the highest and best use may be a use less valuable than the uses allowed by the present zoning. Thus, there may be a difference of opinion between appraisers in many cases as to what the highest and best use might be, based upon the "multiplicity of factors" which might affect that determination. There may also be differences of opinion as to what the possibility of rezoning is in a particular case, and thus, there may be widely differing professional opinions in a given case as to how the highest and best use might impact fair market value.

Plaintiff's proposed construction of MCL 213.55(3) would impermissibly limit a landowner's constitutionally guaranteed right to receive just compensation based upon the highest and best use of the property taken. Plaintiff has argued, in effect, that a property's highest and best use cannot be a use more valuable than the use allowed by the present zoning unless the landowner gives notice of intention to claim compensation for a higher or better use under MCL 213.55(3). Thus, Plaintiff's argument is evidently based upon a presumption that the present zoning accurately reflects the highest and best use of the property at issue. There is no basis for any such presumption in the language of the statute, and it would clearly be inappropriate to insert this, or any other limitation of the landowner's right to just compensation, by judicial embellishment. It is reasonable to assume that if the Legislature had intended to limit the determination of highest and best use in this manner, it would have included appropriate language signifying that intent. It did not elect to do so, and thus, it

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would be inappropriate to attribute a legislative intent that is not expressed by the language actually used.

Thus, despite Plaintiff's protestations to the contrary, it is plain that a potential increase in fair market value attributable to a possibility that the land may be rezoned to allow a higher or better use is just one of the many elements of value which must be weighed to determine just compensation based upon the property's highest and best use, properly determined in accordance with the USPAP standards. On pages 4-5 of its Reply Brief, Plaintiff attempts to evade this simple truth by its claim that "[t]he "property right" for which Appellants claim they should have been compensated was the lost right to develop their land under an assumed but inapplicable zoning classification." This is a mischaracterization of Defendants' position, apparently offered to lend support to Plaintiff's claim that such "lost opportunity" is a "property right" and thus, an "item of property" which must be claimed under MCL 213.55(3) if omitted from, or insufficiently included in, the condemning agency's good faith offer.

This argument misses the mark because Defendants are not claiming compensation for a "right" to have the property developed as professional office space. They are, instead, claiming the right to be compensated for the fair market value of the property, determined according to its highest and best use, taking into account any reasonable possibility for rezoning. This may not necessarily be based upon an assurance that the property will, in fact, be rezoned and developed in accordance with the new zoning classification.[3] Under

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[3] Because possibilities for rezoning are relevant to determination of fair market value, such possibilities may substantially increase (or decrease) the amount of money that a willing purchaser would pay for a subject property. Thus, for example, a prospective purchaser might pay more for a parcel of vacant land currently zoned for agriculture if it is adjacent to (and most likely to be rezoned to) a high density commercial mall zoning than the same purchaser

controlling Michigan law, if there is a reasonable possibility of rezoning, the value added by that possibility must be included in the award of just compensation to the landowner. If the trial court finds the possibility slight, it may accord that possibility whatever weight it deserves, but the possibility must be considered.

Based upon its incorrect interpretation of MCL 213.55(3), the trial court improperly refused to consider the possibility of rezoning at all, and in doing so, has denied Defendant Echo 45, LLC its constitutionally guaranteed right to have its property appropriately valued in accordance with its highest and best use.

B. PLAINTIFF'S ARGUMENTS INAPPROPRIATELY ASSUME THAT A LANDOWNER WILL NECESSARILY HAVE THE KNOWLEDGE OR INFORMATION NECESSARY TO DETERMINE THE PROPERTY'S HIGHEST AND BEST USE, AND TO CLAIM JUST COMPENSATION BASED UPON A POSSIBILITY OF REZONING, WITHIN THE TIME PERMITTED FOR SUBMISSION OF CLAIMS UNDER MCL 213.55(3).

In its Reply Brief, Plaintiff has continued its effort to divert the Court's attention from the purely legal question propounded in its Order of July 9, 2006[4] by arguments addressed to the unique factual circumstances of this case.

On page 4 of its Reply Brief, Plaintiff complains that the *Amicus Curiae* "would have this Court believe that the present case is relevant to a factual setting where "property owners

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would pay if the vacant land were adjacent to (and most likely to be rezoned to) low density residential zoning. In these two instances, the buyer is not paying for a "right" to develop in accordance with a certain zoning classification, but is instead investing in the possibility that he will reap the benefit of a favorable zoning change. It is beyond cavil that such considerations are routinely weighed in the marketplace, and must therefore be considered in determining fair market value.

[4] The Court's Order of June 9, 2006 provides that: "The parties shall limit the issues to be addressed at oral argument to whether a landowner is required, under MCL 213.55(3), to provide written notice to the condemning authority of the landowner's claim of compensation for the "possibility of rezoning of the condemned property."

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. . . receive offers from condemning agencies for their property and, without a professional appraisal, are unaware of all of the factors that may affect the property's value" ... This is not such a case." Plaintiff has not offered any basis for its asserted conclusion that "this is not such a case." But whether this case is, or is not "such a case" is irrelevant because the erroneous published opinion of the Court of Appeals will be binding as authority in future cases which may involve factual scenarios and parties very different from those appearing here if the Court does not address and settle the legal question posed in its Order of June 9, 2006.

The erroneous published holding of the Court of Appeals does not draw any distinction between matters which are known or unknown to the landowner before he has obtained his own appraisal of the property, nor does it provide any means for distinguishing cases where an appraisal is, or is not, obtained by the condemning authority for use in determining its "good faith offer." Thus, the erroneous decision of the Court of Appeals may very well be applied to bar legitimate claims for compensation in future cases where factors supporting a reasonable possibility of rezoning to permit a higher and better use are known to appraisers and other knowledgeable parties such as real estate brokers and developers, but are not known to the particular landowner. How are these landowners to know that they have a claim for additional compensation based upon a reasonably possible higher and better use until after their appraisals have been prepared, which may often come after the deadline for filing claims under MCL 213.55(3)?

Indeed, it is not unreasonable to expect that a condemning agency may be aware of factors suggesting a reasonable possibility of rezoning which may be unknown to an unsophisticated landowner, and that the agency may suppress or fail to disclose that

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knowledge to obtain an unfair advantage in some cases. This might occur, for example, where an existing zoning classification is no longer reasonable in light of new or proposed development or other changes in the community, and discussions have occurred concerning potential efforts to seek rezoning. The condemning authority might be aware of the potential for rezoning, which could very well be overlooked by landowners in the area who are unsophisticated, unobservant, or occupied with other affairs. In such a case, the condemning authority could conveniently ignore a real potential for rezoning with the hope that it would not be discovered until after the time for filing claims under MCL 213.55(3) has passed.

And how are landowners to know whether the condemning authority's good faith offer has been determined based upon the highest and best use in cases where the good faith offer has not been supported by an appraisal? The statute does not require that the condemning agency support its good faith offer with an appraisal, and thus, there is no requirement that the condemning authority identify the use that it has considered to be the highest and best use in determining the value offered.[5] Without a supporting appraisal, the landowner cannot know, for sure, whether the condemning authority has based its purported good faith offer on the true highest and best use of the property, or whether the condemning authority has even attempted to determine the highest and best use at all.

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[5] MCL 213.55(1) requires disclosure of the condemning agency's appraisal if an appraisal has been prepared, but does not require that the good faith offer be based upon an appraisal:

> "(1) Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established. . . The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property. . ."

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Defendants would urge the Court to consider, for example, the following hypothetical attempt by White City to condemn Blackacre, which is zoned for residential use. Most residentially zoned property in White City is valued in a range between $50.00 to $150.00 per acre. However, Blackacre is located between two properties, one zoned for apartment complexes (generally valued at $125.00 to $175.00 per acre) and the other zoned for shopping malls (generally valued at $150.00 to $200.00 per acre). White City makes a good faith offer of $150.00 per acre for Blackacre, without delivering any appraisal information to the landowner. Even presuming that the landowner is sophisticated enough to understand and investigate these valuation ranges, how is the landowner to know if the municipality is making a good faith offer based on the high end of the actual residential zoning, the mid-range of the potential future apartment re-zoning, or the low end of the possible commercial re-zoning? Clearly, he cannot.

The Court is invited to further suppose, in this hypothetical scenario, that the landowner, reasonably believing (based upon the characteristics of the property and new or proposed development of vacant land in the community) that the property's highest and best use is commercial mall use, and inferring that the "good faith offer" must therefore have been based on the low end of the commercial mall zoning, provides no notice to the condemning authority of its presumed highest and best use/possibility of rezoning to commercial mall zoning. In that event, under the Court of Appeals' holding in this case, if the condemning authority later came into court, after expiration of the time provided for making claims under MCL 213.55(3), declaring that its "good faith offer" was, in fact, based on the high end of residential zoning, the trial court would be required to exclude the landowner's claim for just compensation based upon his different, but entirely reasonable, highest and best use of

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commercial mall development on the theory that he never provided notice of "the possibility of rezoning."

In this scenario, the Court of Appeals holding in this case would place the owner of Blackacre in the impossible situation of having to notify the condemning authority that it has used the "wrong" zoning/highest and best use classification, even though the landowner has no idea which classification the condemning authority has used, and unfairly penalize him for failure to do so. This conundrum would arise solely by virtue of the Court of Appeals' erroneous conclusion that a possibility of rezoning is a separate "element" of damage, rather than one of many factors affecting a property's highest and best use, and, therefore, its market value.

All of this raises a number of troublesome questions that the Plaintiff cannot answer. How can a landowner be expected to provide notice to a condemning authority that its good faith offer did not value the property according to the most appropriate highest and best use, or claim that a potential for rezoning to a higher and better use has been overlooked, when the condemning authority has not revealed which highest and best use, if any, was utilized to determine the value offered?[6] How, consistent with constitutional due process, can a landowner be penalized for failure to assert a claim that he may very well be unaware of, and cannot be reasonably expected to become aware of, until it is too late to do so? And how can it even be suggested that the landowner must do so when the statute does not require the

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[6] On page 12 of their original brief in opposition to Defendants' application, Plaintiff's counsel have said that, under the statute, "it is irrelevant what was, or was not, included in Plaintiff's original appraisal of the property." Defendants are perplexed by this puzzling pronouncement. If a landowner must give notice of a difference of opinion as to the applicable highest and best use, it stands to reason that he must know what highest and best use was assigned by the condemning agency.

condemning authority to give him the information that might identify the basis for a claim in time to assert it under § 55(3)?

Plaintiff's proposed interpretation of the statute would sanction these unconscionable and absurd results which were obviously unintended, and which would impermissibly diminish the landowner's constitutionally guaranteed right to receive just compensation based upon the highest and best use of the property taken. Again, it is obvious that this was not intended in light of the parallel provision governing disclosure of appraisals in MCL 213.61, added by the same amendatory legislation that added subsection 55(3).

On pages 5-6 of its Reply Brief, Plaintiff states that:

> "The possibility of rezoning to a classification not presently assigned is speculative and valueless or it is factually supportable and capable of being valued. To determine in which category a particular category falls one must know: (1) what zoning classification is being contemplated, and, (2) what facts render that rezoning reasonably attainable."

Plaintiff goes on to assert that:

> "In condemnation cases where a landowner claims an enhanced property value based upon such a possibility he, not the condemning authority, possesses "sufficient information and detail to . . . evaluate the validity of the claim and to determine its value." This is clearly the kind of information the Legislature required to be disclosed when it amended MCL 213.55 to add subsection (3)." (Plaintiff's Reply Brief, p. 6)

The logic of these arguments is flawed for four reasons. First, as noted previously, the condemning authority is under no obligation to advise the landowner of the zoning classification and/or highest and best use it has used in formulating its "good faith offer." Second, Plaintiff's interpretation of the statute overlooks the very important fact that circumstances suggesting a reasonable possibility of rezoning may be unknown to a landowner in many cases, and indeed, such circumstances may instead be known to, and/or

ignored by, the condemning authority.[7] Third, it is by no means "clear" that the Legislature had this issue in mind at all when it added subsection 55(3) in 1996.[8] Indeed, as Defendants have noted before, the amendments of MCL 213.61 made by the same amendatory act suggest a legislative intent to treat valuation issues separately, and this, in turn, suggests that the new subsection 55(3) was not intended to address these issues.

Finally, as Plaintiff properly acknowledges on page 6 of its Reply Brief, "post-filing discovery can be utilized to reveal a landowners' position regarding an appropriate rezoning for the property at issue and uncover the facts the owner relies upon to support that opinion." These are questions which may be effectively probed through the use of conventional discovery techniques. For example, a set of interrogatories to the landowner may require him to state whether or not he will be claiming compensation based upon a possibility of rezoning,

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[7] The potential for the landowner to be prejudiced by such lack of disclosure is even more acute when different portions of a property may have variable physical characteristics, making it even more difficult for the landowner to determine which highest and best uses and/or assumptions were utilized to determine the value of the property to be offered as just compensation. Whether the landowner is sophisticated or unsophisticated, he cannot be expected to understand the bases for the condemning agency's "good faith offer" in such cases without knowing all of the assumptions and variables used to determine the value of the property. This is a prime example of why the statute requires only that the landowner provide notice of excluded or insufficiently included elements of property or damage, as opposed to the landowner's suspicion that elements of value may have been overlooked or insufficiently weighed in determining the amount to be offered for the property identified in the condemning agency's good faith offer. The more expansive construction of the statute proposed by the Plaintiff and adopted by the Court of Appeals in this case would be detrimental to the administration of justice in these cases, as it would force landowners to file written claims disputing the condemning authority's "good faith offer" in nearly every case, even if the amount of the compensation offered is the only disputed issue.

[8] The totality of the statutory scheme, case law and established appraisal practices suggest, much more persuasively, that if issues of highest and best use and possibility of rezoning were considered at all in relation to the 1996 legislation, those issues were considered elements of the fair market value to be paid as just compensation, and not as separate elements of "property" or "damage" beyond the value to be paid for the property identified in the good faith offer.

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and the landowner's response may reveal, early on, that such a claim will be made. The landowner's response might also state that a complete response must await the completion of his appraisal, in which case the condemning authority will be fairly put on notice that such a claim may be made based upon the appraisal.

But Plaintiff complains that this is not enough. On page 6 of its Reply Brief, Plaintiff asserts that "post-filing discovery is not accompanied by the right to supplement an agency's original good faith offer and thereby control its exposure to pay the landowner's maximum reimbursable attorney fees under MCL 213.66. Affording condemning agencies an opportunity to minimize their risk relative to these expenses is a primary objective of the statute under review." This objection is unpersuasive because it overlooks the fact that reduction of attorney fee awards was only one of the purposes of the 1996 legislation. As Defendants have noted previously, the available legislative analyses suggest that the addition of subsection 55(3) was intended to benefit both landowners and condemning agencies. The Legislature could have adopted a provision affording more complete protection for condemning agencies, but it did not elect to do so. If Plaintiff believes that the Legislature has not gone far enough, its concerns should be addressed to the Legislature.

On pages 7-8 of its Reply Brief, Plaintiff properly acknowledges that a determination of just compensation requires "the consideration of all the multiplicity of factors that go into making up value" and that this multiplicity of factors "may include the reasonable possibility of rezoning." But Plaintiff goes on to argue that consideration of such a possibility "necessarily assumes the one making a just compensation determination knows what alternative zoning classification is contemplated and what facts render it reasonably possible." This argument misses the mark because the statutory scheme does not assume that the

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condemning agency's good faith offer will always be based upon an accurate valuation. The statute requires a good faith offer based upon a value determined by the condemning agency. If the condemning agency fails to determine the highest and best use because it is unaware of circumstances suggesting a reasonable possibility of rezoning, a more reasonable offer can be made when the circumstances are brought to light. If the condemning agency and the landowner cannot agree, the appropriate valuation will be a question of fact for the trier of fact.

On page 8 of its Reply Brief, Plaintiff claims that "in the present case a purchaser in the private sector would have confronted the same absence of information as Appellee regarding the possibility that Appellants' property might be rezoned to, and developed in accordance with, a nonresidential zoning classification. Thus, a price arrived at on the open market could not have included this component of Appellants' subjective valuation." There is no basis for this assumption. In a private sale, the seller's expectations would obviously be made known to the prospective purchaser, and an appropriate sale price would be negotiated.

Finally, on page 8, Plaintiff asserts that: "It would be patently unfair, and contrary to both the letter and intent of MCL 213.55(3), if Appellee was nevertheless required to arrive at, and be bound by, a pre-filing determination of just compensation without benefit of valuation factors know only to the landowner." Presumably, Plaintiff's complaint about being bound by a pre-filing determination of just compensation refers to the condemning agency's potential liability for attorney fees based upon the original good faith offer. If any unfairness is perceived in the way the statutory scheme would operate in such circumstances, the Legislature is free to change it. Moreover, it should be noted that Plaintiff's interpretation would give rise to a different potential for unfairness. It would be equally unfair to the

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landowner (and unconstitutional as well) to deprive him of a reasonable opportunity to assert a claim for just compensation based upon a reasonable possibility of rezoning where the circumstances supporting that possibility are not discovered by the landowner until after expiration of the time provided for making claims under subsection 55(3). Is the Court to assume that the Legislature preferred this potential unfairness to the landowner over the potential unfairness to the condemning agency that Plaintiff has complained of? The statute contains no basis for such a conclusion and, as noted previously, the parallel provisions of MCL 213.61 suggest that this was not intended. But if there is any doubt about this, the Court must adhere to the construction of the statute which will not infringe the landowner's constitutionally guaranteed right to just compensation.

RELIEF

WHEREFORE, Defendants–Appellants Land One, L.L.C. and Echo 45, L.L.C. respectfully request that this Honorable Court grant their application for leave to appeal, or other appropriate peremptory relief.

Respectfully submitted,

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